The Published Opinions of Judge Terrence L. Michael

The following synopses are provided for the benefit and assistance of parties and attorneys who appear and practice in this Court. The synopses are brief and general in nature and may not be cited as authority in and of themselves. They are not intended to be a substitute for a review of the opinions in their entirety.

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1. *In re Diviney*, 211 B.R. 951 (August 19, 1997) *affirmed*, *In Re Diviney*, 225 B.R. 762 (10th Cir. BAP (Okla.) 1998). Adv. No. 97-0040-M.

   ISSUE: The questions presented to the court were: (1) whether a bank, at the time of repossession, held a security interest in the motor vehicle; and (2) whether damages should be assessed the bank pursuant to § 362(h).

   RULING: The court concluded that damages under § 362(h) were appropriate because the bank had violated "one of the fundamental debtor protections provided by the bankruptcy laws," which is the automatic stay provision of § 362. The facts indicated that the reinstatement of the Chapter 13 plan had occurred and notice was given to all parties with an interest in the estate, including the bank; that the car was the property of the bankruptcy estate subject to the automatic stay provision; and that the sale of the vehicle after repossession was not the enforcement of a valid lien, but the unauthorized taking of the estate's property. The court finally concluded that the conduct of the bank was "willful" and that punitive damages in the amount of $40,000 was appropriate.

2. *In re Limited Gaming of America, Inc.*, 213 B.R. 369 (October 1, 1997). Case No. 96-00395-M.

   ISSUE: Whether the IRS should be allowed to file an out-of-time claim for unpaid income taxes for two separate years against a Chapter 11 estate some thirteen months after the claims bar date had expired; or whether the IRS should be granted leave to file an amended proof of claim to include those amounts.

   RULING: The court held that each year constitutes a separate claim in terms of income tax debt. The court then held that there were certain objective factors to help aid in the determination that an amendment is necessary in such situations, and that many of the factors in the case indicated that amendment was not proper (e.g., the IRS did not

present proper notice that its first claim was only an estimate, that the increase in the figure would create a windfall for the IRS against other non-priority creditors, and that it would be inequitable to allow such an amendment because the facts indicate that the amended amount is essentially a new claim). The court further held that the "excusable neglect" excuse contained in F. Bankr. R. 9006(b)(1) was inapplicable because failure to request an extension does not rise to the level of negligence required.

3. *In re Coats*, 214 B.R. 397 (October 21, 1997). Adv. No. 97-0008-M.

ISSUE: Whether exempting a debtor's student loans from discharge in a Chapter 7 proceeding would impose an undue hardship on the debtor and her dependents under § 523(a)(8)(B).

RULING: The court adopted the three pronged test set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2nd Cir. 1987), and found that all three prongs of the test were met in facts presented to the court in this instance (e.g., the debtor did not possess the present ability to pay, the debtor's future financial situation was uncertain, and that there was no fraud present in trying to discharge her student loans), and accordingly, discharged the student loan debt.

4. *In re Payne*, 215 B.R. 889 (November 13, 1997). Case No. 97-03512-M.

ISSUE: Whether a Chapter 7 debtor may avoid nonpossessory, non-purchase money liens held against a riding lawn mower, push mower, and hand tools pursuant to § 522(f) and under Oklahoma's exemption statutes, Okla.Stat. tit. 31 § 1, *et seq*.

RULING: The tools were not exempt under the "tools of the trade" exemption found in Okla.Stat. tit. 31 § 1(A)(6). Both of the lawnmowers were considered as "household and kitchen furniture held primarily for the personal, family, or household use of such person or a dependant of such person" as dictated under Okla.Stat. tit. 31 § 1(A)(3), and were therefore exempt based upon the facts of the case.

5. *In re Reconversion Technologies, Inc.*, 216 B.R. 46 (December 10, 1997). Case No. 95-00821-M.

ISSUE: Whether fees for various professionals were reasonable under § 330 of the United States Bankruptcy Code.

RULING: The court went through a detailed analysis of the facts presented, and found that there was a benefit conferred to the estate, but that some of the billed charges were superfluous and unwarranted. The court made its decision by going through a detailed analysis of many relevant factors in determining the relative worth of work performed (e.g., the calculation of hourly rates, the difficulty of the case, the skill required to perform the certain duties, and many others), and concluded that fees were warranted, but they must be altered and reduced to fit the reasonableness requirements of § 330.

6. *In re Brooks*, 216 B.R.838 (January 5, 1998). Case No. 97-03413-M.

ISSUES: (1) Whether the debtor was eligible for relief under § 109(e) of the United States Bankruptcy Code because of a $250,000 debt to the IRS; (2) whether the debtor was precluded from re-litigating the issue of eligibility under the doctrine of *res judicata*, and (3) whether the debtor filed his Chapter 13 case in "good faith."

RULING: The court first held that the debt owed to the IRS was a liquidated, noncontingent, unsecured debt in excess of $250,000, and that the debtor may not "shoehorn" himself into a Chapter 13 bankruptcy merely because he disputed the amounts owed to the IRS. The court next held that the doctrine of *res judicata* set forth in *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255 (10th Cir. 1997), prevented the re-litigation of the issue. The court further held that the Chapter 13 bankruptcy case was filed in "bad faith" because debtor was engaged solely in a two party dispute (Debtor v. IRS), and that there are other alternative forums better suited to resolve the dispute (U.S. Tax Court).

7. *In re Heidenreich*, 216 B.R. 61 (January 15, 1998). Adv. No. 89-0233-M.

ISSUE: Whether the Bankruptcy Court lacks the jurisdiction to determine a sum certain in a dischargeability proceeding under § 523(a)(4).

RULING: No. The Court concluded that "the equitable jurisdiction of the bankruptcy court which indisputably extends to determination of the dischargeability of a debt cannot be separated from the function of fixing the amount of nondischargeable debt," and that, "the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief."

8. *In re Yates*, 217 B.R. 296 (February 12, 1998). Case No. 97-02126-M.

ISSUE: The issues presented to the court were whether the customary "flat-rate" fee of $1,300.00 for a "routine" Chapter 13 case should be raised without the necessity of a detailed fee application contemplated by F. Bankr. R. 2016; and whether the court should create a "sliding-scale" for awarding compensation to counsel for Chapter 13 cases.

RULING: The court held that it would not raise or lower the customary rate for Chapter 13 cases in the Northern District of Oklahoma, and that it would review each case in order to determine the reasonableness of the fee as dictated by § 330. If it is determined that the fees are unreasonable, an evidentiary hearing will be held, and detailed time records, while not required, will greatly aid in the court's ultimate decision. The court also held that it would not establish a "sliding scale" for awarding fees without the necessity of a detailed fee application.

9. *In re Herrig*, 217 B.R. 891 (March 3, 1998). Adv. No. 97-0292-M.

ISSUE: Whether credit card debt incurred through cash advances to pay gambling debt is nondischargeable under § 523(a)(2)(A).

RULING: After a detailed analysis of the factual circumstances surrounding the debt, the court concluded the debt was nondischargeable.

10. *In re Nichols*, 223 B.R. 353 (March 10, 1998). Case No. 97-03255-M.

ISSUE: Whether a Chapter 11 bankruptcy case filed in an effort to resolve a two party dispute (e.g., a divorce action) was filed in "good faith."

RULING: No. The court held that the issue of "good faith" is a matter left to the sound discretion of the bankruptcy judge, and that there are certain objective factors that aid in the final decision of the court. In this case more than one of these factors was present and the Court dismissed the case. The court also noted that "the use of a bankruptcy court to resolve a marital dispute is rarely if ever appropriate, and it is certainly not appropriate on the facts before it [in this case]." The case was dismissed.

11. *In re Schubert*, 218 B.R. 603 (April 10, 1998). Case No. 97-05856-M.

ISSUE: Whether a cause of action for undisclosed defects in a residence attaches to the properly claimed homestead exemption under Okla. Stat. tit. 31 § 1(A)(1) and is thus exempt under the statute.

RULING: No. The court concluded that the state court action did not attach to the residence because it did not fit the enumerated exemptions set forth in the statute, and that the damages sought in the suit were personal property (the seeking of punitive damages) and not real property or reimbursements for damages to real property, i.e., insurance money.

12. *In re McMasters*, 220 B.R. 419 (April 17, 1998). Case No. 97-05623-M.

ISSUE: Whether a judgment lien held by a Chapter 13 creditor may be avoided under § 522(f)(1)(A) despite a recent change to Oklahoma law which allows liens to attach to the homestead.

RULING: Yes. The court concluded that the Supreme Court case of *Owen v. Owen*, 500 U.S. 305 (1991), was controlling in the issue, and that "under the rationale of *Owen*, debtors may avoid liens upon property in order to avail themselves of the full benefit of the exemption even if the lien at issue is not avoidable under applicable state law." Thus, federal law trumps Okla. Stat. tit. 12 § 706(B)(2), which would have allowed the lien because it impairs the homestead exemption.

13. *In re Nichols*, 221 B.R. 275 (May 28, 1998). Case No. 97-03255-M.

ISSUE: Whether the estranged wife of the debtor should be awarded attorneys' fees and costs pursuant to Fed R. Bankr. P. 9011, Fed. R. Bankr. P. 7054, or § 105 (the courts inherent powers) after winning a motion to dismiss under 1112(b).

RULING: No. The court held that absent a statutory basis or an enforceable contract between the parties, each party pays his or her own fees and expenses in court. Rule 9011 is not applicable because the debtor's argument is not fraudulent or frivolous, and it is merely "colorful" or "novel," which the Tenth Circuit has held to be acceptable (*In Re Edmonds*, 924 F.2d 176, 181-182 (1991)). The court also held that the filing of the Chapter 11 did not rise to the level of vexatious, wanton, or oppressive behavior that warrants sanctions under § 105.

14. *In re Muskogee Environmental Conservation Co., Inc.*, 221 B.R. 526 (June 2, 1998) Case Nos. 96-04292-M; 96-04293-M; 96-04522-M.

ISSUE: Whether the creditors of a Chapter 11 estate should be allowed to take a deposition of and obtain the work files of the debtor's attorney.

RULING: No. The court concluded that the request of the deposition of debtor's counsel did not meet the three-pronged test as set forth in *Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995); and that the attorney-client privilege, as dictated by Okla. Stat. tit. 12 § 2502 *et seq*. and Oklahoma case law was not waived for any of the reasons that were put forth in plaintiffs' argument.

15. *In re Hatley*, 227 B.R. 753 (June 18, 1998); *affirmed*, *In Re Hatley,* 227 B.R. 757 (10th Cir. BAP (Okla.) 1998); *affirmed*, *In re Hatley,* 194 F.3d 1320 (10th Cir. (Okla.) 1999). Adv. No. 97-0204-M.

ISSUE: Whether a business owned by two people was a corporation or a partnership; and whether a debt owed by one of the partners to the other was nondischargeable under § 523(a)(4).

RULING: The court held that the business was a partnership under Okla. Stat. tit. 54 § 206 and the elements proscribed in Oklahoma case law. The court also concluded that it was bound by the Tenth Circuit's holding that the UPA (Oklahoma Uniform Partnership Act) does not create the kind of fiduciary duty which was intended for § 523(a)(4), and that neither Oklahoma's version of the UPA, nor Oklahoma case law establishes the fiduciary relationship. Thus, the debt was dischargeable in the Chapter 7 bankruptcy.

16. *In re Hermann*, 221 B.R. 944 (July 7, 1998). Adv. No. 97-0284-M.

ISSUE: Whether the debtors would be able to discharge their past due income taxes in a Chapter 7 bankruptcy when their original due date was more than three years old, and they improperly filed for an extension.

RULING: No. The court concluded that the improperly filled out extension, Form 4868, was not void *ab initio* because such an extension is granted automatically unless the IRS notifies to the contrary, thus placing the outstanding income taxes within the time frame for non-discharge as proscribed under § 523(a)(1)(A). The court also

concluded that it would be inequitable to allow a discharge in this situation because the debtors had already benefitted from the extension they now wished to say was void.

17. *In re Kusler*, 224 B.R. 180 (July 10, 1998). Case No. 97-05065-M.

ISSUE: Whether certain fees should be awarded to a Chapter 7 Trustee under § 330 when the only asset of the Chapter 7 estate was a vehicle sold at an auction, and the proceeds were used to pay the professionals, leaving no money left for the creditors of the estate.

RULING: The court held that such a situation was to be strictly scrutinized, and that evidentiary hearings would be set for the trustee, the law firm, and the accountant of the debtor to present a detailed billing schedule, and how their services benefitted the estate in some way.

18. *In re Tulsa Litho Co.*, 232 B.R. 240 (August 3, 1998); *affirmed*, *In re Tulsa Litho Co.,* 229 B.R. 806 (10th Cir. BAP (Okla.) 1999). Adv. No. 97-0378-M.

ISSUE: Whether there was a preferential transfer under § 547(b) between a paper supplier and a paper retailer; and whether or not the defense of "ordinary course of business" as proscribed by § 547(c)(2) was valid when it was the first business transaction between the two companies, the payment was made by a cashier's check, and the terms of the contract (including the amount) were not met with full compliance.

RULING: The court concluded that while all the elements of § 547(b) were met, the trustee could not avoid the transfer because the subjective and objective tests for a § 547(c)(2) defense were both met. The court noted that first transactions are acceptable for the defense (subjective), that a cashier's check was not in and of itself dispositive of a preferential transfer (again subjective), and that there was nothing to suggest that the money which was transferred was unusual in the paper industry (objective).

19. *In re Robinson*, 225 B.R. 228 (September 15, 1998). Case No. 97-05672-M.

ISSUE: Whether a secured creditor in a Chapter 13 case, which involved a motor-vehicle, could receive an administrative priority claim under § 503(b)(1)(A) when the creditor neither requested nor was granted adequate protection under § 361.

RULING: No. The court held that the stipulated agreement between the parties which determined the priority of the claim was invalid because it violated the purpose and spirit of the Bankruptcy Code.

20. *In re Limited Gaming of America, Inc.*, 228 B.R. 275 (December 18, 1998). Case Nos. 96-00395-M; 96-00386-M.

ISSUE: The issues presented to the court were substantive consolidation of two bankruptcy estates and confirmation of a Chapter 11 plan.

RULING: The court concluded that substantive consolidation of the two estates was proper. The court also concluded that the proposed plan comported with § 1129 after a systematic analysis of each element of the rule.

21. *In re Klaus*, 228 B.R. 475 (January 11, 1999). Case No. 98-01501.

ISSUE: Whether a debtor may subdivide property whose primary use has been commercial, and in the process carve out a fully exempt homestead under Okla. Stat. tit. 31 § 1, *et seq*.

RULING: No. The court held that the land was a "mixed-use" property, and that it was fully subject to Okla. Stat. tit. 31 § 2(C), which limits such exemptions to $5,000 when 25% of the total square footage of the improvements of the claimed homestead is used for business purposes.

22. *In re Woodward*, 229 B.R. 468 (January 27, 1999). Case No. 97-05149-M.

ISSUE: Whether an attorney, who performed work for a Chapter 7 debtor's counsel, should have his fees disgorged as a result of his failure to disclose the receipt of fees in compliance with § 329(a).

RULING: Yes. The court concluded that § 329(a) is to be strictly construed, and that it is clear that the section includes disclosure of any compensation shared with another attorney because "Section 329 is a disclosure provision designed to prevent bankruptcy attorneys from extracting more than their fair share from whatever is necessary to obtain counsel of choice and avoid unfavorable bankruptcy proceedings." The court also concluded that a failure to disclose such information could warrant serious sanctions if other evidence demonstrated bad faith on behalf of the attorney in question.

23. *In re Bison Resources, Inc.*, 230 B.R. 611 (February 24, 1999). Case No. 98-04675-M.

ISSUE: Whether the court should grant relief from the automatic stay provisions of § 362 in order to allow a state court action against the debtor to proceed to trial.

RULING: Yes. The court held that the decision should be made on a case-to-case basis, and that certain objective factors help aid in the final decision. The facts in this case presented many of these factors and found that cause existed for the lifting of the automatic stay so that the state court action could proceed.

24. *In re Witt*, 231 B.R. 92 (March 10, 1999). Adv. No. 97-0402-M.

ISSUE: Whether the Religious Freedom Restoration and Charitable Donation Protection Acts preclude the avoidance of pre-petition transfers to religious charities under § 544(a) or § 548(a)(2) of the U.S. Bankruptcy Code for fraud were constitutional.

RULING: Yes. The court concluded that neither act violated the establishment clause of the First Amendment nor were they in derogation of the tenets of Due Process as set forth in the Fifth Amendment; and that the Trustee was precluded from avoiding such transfers under these Acts when a debtor's contributions do not exceed 15% of his or her annual income, or when the contributions are consistent with the debtor's prior charitable practices.

25. *In re Abboud*, 232 B.R. 793 (April 16, 1999); *affirmed*, *In Re Abboud*, 237 B.R. 777 (10th Cir. BAP (Okla.) 1999). Adv. No. 99-0086-M.

ISSUE: Whether the doctrine of *res judicata* precludes the bankruptcy court from re-examining the validity of a state court judgement against a Chapter 13 debtor.

RULING: The court held that *res judicata* is only to be applied when the underlying judgment is final. Under Oklahoma law, *res judicata* is not applicable when the appellate court has not decided the case. However, the court held that because the debtor was essentially seeking a review of a judgment determined by Oklahoma state law, the court was prevented from reviewing such matters because of the *Rooker-Feldman* doctrine, which prevents an inferior federal court from reviewing a state court decision.

26. *In re Woodward*, 234 B.R. 519 (May 11, 1999). Adv. No. 98-0316-M.

ISSUE: Whether liens for rendered medical services were properly perfected pre-petition of a Chapter 7 bankruptcy under Okla. Stat. tit. 42 § 44(a); and whether a second filing of the liens post-petition to remedy defects could be avoided by the trustee under § 549.

RULING: Yes. The court concluded that the liens were not properly perfected under Oklahoma statutory law, and that Okla. Stat. tit. 42 § 44(a) conditions are to be strictly construed in such matters. The court also concluded that there is no language in the statutory law which allows the lien filed post-petition to relate back to the date of the first, and therefore they are avoidable by the trustee under § 549, and there is no exception created by § 362(b)(3) or § 546(b) that would allow the liens to stand.

27. *In re Muskogee Environmental Conservation, Co.*, 236 B.R. 57 (July 14, 1999). Case Nos. 96-04292-M; 96-04293-M; 96-04522-M.

ISSUE: Whether a Chapter 11 bankruptcy petition of a corporation should be dismissed under § 1112(b) for cause or "bad faith."

RULING: The court held that the question is to be answered on a case-to-case basis, and that certain objective factors aid in the final decision. This case presented many of these factors (e.g., debtors' possession of one asset, litigation against a single creditor, and the avoidance of a supersedeas bond), and therefore should be dismissed.

28. *In re Prince*, 236 B.R. 746 (August 2, 1999). Case No. 99-02004-M.

ISSUE: Whether the debtors in a Chapter 13 bankruptcy should be allowed to avoid a lien on their homestead under § 522(f)(1) of the United States Bankruptcy Code.

RULING: Yes. The court concluded that the lien should be avoided because it was a judicial lien, and that it impaired the debtors' homestead exemption. However, the court also held that, upon the timely motion of the lienholder the avoidance order will not be entered on real estate records until the order of discharge has been entered.

29. *In re Polishuk*, 243 B.R. 408 (August 24, 1999); *affirmed, Polishuk v. Polishuk (In re Polishuk),* District Court No. 99-CV-901-C(J) (slip op. October 19, 2000): *See* Bankruptcy Case No. 98-02320-M, Docket No. 201. Adv. No. 98-0260-M.

ISSUE: Whether debts in the form of attorneys' fees (as proscribed under Okla. Stat. tit. 43 § 110(C)), applicable interest, and credit card debt assigned to the debtor in a divorce decree is dischargeable under § 523(a)(5); and whether those debts are entitled to priority status under § 507.

RULING: Yes. The court held that the *Rooker-Feldman* doctrine did not apply simply because a state court had concluded that the debt was in the nature of support, and that the debts incurred from the divorce decree met the two-part test constituting "alimony to, maintenance for, or support of the plaintiff" thus making them nondischargeable. The court also held that identical language governing § 523(a)(5) and § 507 allows the same two-part test for assigning priority claim status as well, and since the debts were found to be in the nature of support they are also entitled to priority status.

30. *In re Claxton*, 239 B.R. 598 (September 27, 1999). Case No. 99-02397-M.

ISSUE: Whether a manufactured mobile home was a fixture and thus subject to a lien created by a mortgage on the land where it was placed under Okla. Stat. tit. 60 § 7.

RULING: The court concluded that the evidence indicated that there was an actual annexation to the real property; that their use of the property was suitable for the fixture; and that the debtors had the requisite intent to permanently secure the fixture to the real property. Thus, the mobile home was found to be a fixture under Oklahoma law.

31. *In re The Music Store, Inc.*, 241 B.R. 752 (November 13, 1998). Case No. 96-03259-M.

ISSUE: Whether a *nunc pro tunc* application of an accountant should be approved due to the simple negligence (e.g., inexperience in Chapter 11 bankruptcies) of the debtor's attorney in not timely filing an application for employment.

RULING: The court held that simple neglect will not justify *nunc pro tunc* approval of a debtor's application for employment of a professional.

32. *In re Sims*, 241 B.R. 467 (November 23, 1999), *affirmed*, *In re Sims,* District Court No. 00-CV-25-BU(M) (slip op. September 19, 2000): *See* Bankruptcy Case No. 98-02382-M, Docket No. 93.

ISSUE: Whether an inherited Individual Retirement Account was exempt under Oklahoma's law, specifically Okla. Stat. tit. 31 § 1(A)(20).

RULING: The court concluded that the IRA underwent fundamental changes when it was inherited from his father's estate, and that it was no longer an asset that was "qualified for tax exemption purposes," which took it out from under the umbrella of qualification under Okla. Stat. tit. 31 § 1(A)(20).

33. *In re Merrill*, 246 B.R. 906 (March 27, 2000); *affirmed*, *In re Merrill,* 252 B.R. 497 (10th Cir. BAP (Okla.) 2000). Adv. No. 99-0132-M.

ISSUE: Whether debts which an ex-spouse was obligated to pay under the terms of a divorce decree (automobile insurance, life insurance, alimony, and interest on support obligations) were dischargeable under § 523(a)(5); and whether a withdrawal of funds from a child's trust fund was nondischargeable under § 523(a)(4).

RULING: The court held: (1) that debts incurred from the divorce decree met the two-part test constituting "alimony to, maintenance for, or support of the plaintiff" thus making them nondischargeable; and (2) that the debtor violated his fiduciary duty by defalcation by withdrawing money from his child's trust, thus barring him from discharging the debt in bankruptcy.

34. *In re BTS, Inc*., 247 B.R. 301 (April 7, 2000). Case No. 95-01473-M.

ISSUE: Whether a Chapter 11 proceeding should be dismissed or converted into a Chapter 7 proceeding under § 1112(b)(2) when the bankruptcy estate desires a dismissal to pursue state court litigation.

RULING: The court concluded that when the bankruptcy estate's assets are at issue in state court litigation, conversion (rather than dismissal) is appropriate so that a disinterested trustee could protect those assets in the litigation; and that conversion is also necessary to prevent the loss of any preferential claims that may exist.

35. *In re Wheatley*, 251 B.R. 430 (July 26, 2000). Case No. 99-04825-M.

ISSUE: The court was petitioned to determine the post-judgement interest on state judicial judgments owed to creditors by the debtor in bankruptcy.

RULING: The court held that such determinations are governed by Oklahoma law, namely Okla. Stat. tit. 12, § 727. However, since the claims were awarded in different years the court must determine the interest according to the provisions of that statute for the respective year of the claim, along with any retroactive provisions of later amendments to the statute. The court then analyzed the provisions and case law involving Okla. Stat. tit. 12, § 727 and concluded that: (1) prior to January 1, 1998, the interest rate for post-judgement interest did not vary, (2) interest upon judgements did not compound prior to January 1, 1998, and (3) an award of attorney's fees and costs did not accrue interest prior to January 1, 2000. The court then applied these findings to each claim at issue.

36. *In re Hoover*, 254 B.R. 492 (October 23, 2000). Case No. 00-00617-M.

ISSUE: Whether, under § 1322(e) of the Bankruptcy Code, a secured creditor has the right to receive interest on an arrearage over and above any such right contained in the agreement between the parties.

RULING: No. The court determined that in enacting § 1322(e), Congress had expressly overruled *Rake v. Wade*, 508 U.S. 464 (1993)(holding that such interest is allowable). Therefore, the court concluded that the terms of the agreement will control, and that the contract between the debtor and creditor did not have any such provision. However, such provisions, if included, are still subject to applicable state law. The Court also noted that § 1322(e) is only applicable to loan agreements entered into after October 22, 1994.

37. *In re Polishuk,* 258 B.R. 238 (January 31, 2001). Case No. 98-02320-M.

ISSUE: Whether, after a conversion to a Chapter 7, the Court should award attorney's fees to counsel representing the debtor while the case was pending as a Chapter 11 and Chapter 13, and/or to the attorney who represented debtor in a state court action for divorce.

RULING: The Court held attorney fees and expenses should not be awarded to the attorney representing the debtor in the bankruptcy case. The Court found that the attorney's services provided no benefit to the estate, as there was no realistic possibility of reorganization under Chapter 11 or 13. Furthermore, the Court ruled that time spent in

litigation with the debtor's ex-wife was of no benefit to the bankruptcy estate. With respect to the attorney who represented debtor in his divorce, the Court found that a portion of the services performed by said attorney should be compensated for his services from the bankruptcy estate. The bankruptcy case could not proceed until the marital assets of the parties were divided in the divorce action was completed. Thus completing the divorce proceeding was a benefit to the bankruptcy estate.

38. *In re Oklahoma Trash Control, Inc.,* 258 B.R. 461 (February 1, 2001). Case No. 00-03259-M.

ISSUE: Whether an executory contract, which the debtor wants to assume, was effectually terminated prior to the filing of bankruptcy.

RULING: An executory contract terminated prior to the filling of bankruptcy cannot be resurrected and assumed. The Court held the contact had been effectively terminated by the debtor's repudiation of the contract prior to the filing of bankruptcy. It was found that the repudiation was effected by both the declaration of the debtor to end the contract and his subsequent actions making it impossible for the contract to be performed. As such, the other party was relieved from its duties under the contract, and the contract was no longer executory in nature. Therefore, the Court found that there was no contract to be assumed, and denied the debtor's motion for assumption.

39. *Trisza Leann Ray, Plaintiff, v. The University of Tulsa, Works & Lentz, Inc., an Oklahoma professional corporation, and Works & Lentz of Tulsa, Inc., an Oklahoma professional corporation, Defendants (In re Ray),* 262 B.R. 544 (May 3, 2001), Adv. No. 00-0157-M.

ISSUE: Whether the obligation owed by a student to a university for unpaid tuition on open account constitutes " . . an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, . . ." for purposes of § 523(a)(8) of the Bankruptcy Code.

RULING: No. Relying heavily upon the decision of the United States Court of Appeals for the Second Circuit in *Cazenovia College v. Renshaw (In re Renshaw),* 222 F.3d 82 (2d Cir. 2000), the Court ruled that the mere execution of a class enrollment card which contained a statement that the student promised to "pay the total fee assessed based upon this enrollment plus an interest rate of 1.5% monthly on balances over thirty days past due" did not create an educational loan under § 523(a)(8).

40. *In re Lively*, 266 B.R. 209 (June 11, 1998). Case No. 97-03447-M.

ISSUE: Whether a debtor in a Chapter 11 case may make payments on selected pre-petition debt without court authorization.

RULING: No. Relying upon Tenth Circuit precedent (*see In re B & L Oil Company*, 782 F.2d 155, 158 (10th Cir.1986)), the Court held that a debtor may not make payments upon pre-petition debt in the absence of court authorization. The Court rejected the argument that the payments constituted "adequate protection" under § 363 of the Bankruptcy Code, as the creditors receiving payments had made no request for adequate protection. The Court also rejected the argument that these payments were made in the ordinary course of the debtors' business. The Court ordered the debtors to recover said payments "or risk dismissal, appointment of a trustee or conversion to Chapter 7 of the Bankruptcy Code."

41. *The Cadle Co. v. Stephen M. King d/b/a Global Capital Resources (In re King),* 272 B.R. 281 (January 16, 2002). Adv. No. 00-0228-M.

ISSUE: Whether the debtor would be denied a Chapter 7 discharge pursuant to § 727(a)(4)(A) by having material omissions or misstatements in his Schedules and Statement of Financial Affairs.

RULING: Yes. The Court concluded that the debtor "made no less than five separate material omissions or misstatements in his schedules and Statement." The Court went on to say "[w]hether his conduct resulted from actual intent to defraud his creditors or from a reckless indifference to the truth," the result was the denial of a discharge under § 727(a)(4).

42. *In re Durability, Inc.,* 273 B.R. 647 (February 15, 2002), *reversed*, *In re Durability, Inc.*, 166 Fed. Appx. 321 (10th Cir. January 20, 2006). Case No. 86-02594-M.

ISSUE: Whether a trustee may assume a contract of insurance under § 365 of the Bankruptcy Code.

RULING: Debtor, a corporation, obtained a $500,000 policy of insurance upon its chief executive officer. Upon the filing of an involuntary bankruptcy petition against the debtor, the bankruptcy trustee sought to assume the policy. At the time of the Court's ruling, the insured had died. The Trustee sought to assume the policy in order to collect the death benefits. The Trustee argued that the policy had not lapsed, and that, in the alternative, even if a lapse had occurred, certain conduct by the insurance company compelled the conclusion that the Trustee be allowed to assume the contract. The Court, after a detailed analysis of the facts of the case, held the insurance policy lapsed prior to the filing of bankruptcy and denied the Trustee's motion to

assume.

43. *In re Hoyt*, 277 B.R. 121 (April 25, 2002). Adv. No. 01-0023-M.

ISSUE: Whether a Chapter 7 debtor's alleged non-disclosures rendered his obligations under guarantees of debts non-dischargeable based upon section 523(a)(2)(A) (fraud) and section 523(a)(6) (willful and malicious injury).

RULING: Although the Court recognized that a debtor's partial disclosures may trigger a duty to disclose, it found no such partial disclosures here. The Court held that a "representation must be one of existing fact and not merely an expression of opinion, expectation or declaration of intention." Because the Court found that the debtor's non-disclosure regarding billing related to his intentions and/or future events, the debtor's non-disclosure was not held to be a representation under section 523(a)(2)(A). The Court then applied the "totality of the circumstances" approach, and found the debtor not to have the requisite intent to deceive under section 523(a)(2)(A). Finally, the Court held that, even assuming the debtor violated the Bank's Security Agreement, such a violation alone did not satisfy the stringent standard of section 523(a)(6).

44. *In re Smith*, 278 B.R. 532 (May 30, 2002). Adv. No. 01-0190-M.

ISSUE: Whether debtor's alleged false representations within a loan application rendered the resulting debts non-dischargeable under section 523(a)(2)(B).

RULING: The Court adopted the test for a creditor's reasonable reliance under section 523(a)(2)(B) set forth in *In re Cohn*, 54 F.3d 1108, 1117 (3rd Cir. 1995), which employs an objective standard and looks to 1) the creditor's standard practices, 2) the standards of the creditor's industry, and 3) the surrounding circumstances at the time of the debtor's application. Because the Court found that the creditor-Bank did not reasonably rely upon the debtor's application (e.g., failed to investigate several red flags, including large, unsubstantiated interest in partnerships, and failed to present evidence regarding industry standards), the Court held the debts to be dischargeable.

45. *In re Universal Factoring Co., Inc.*, 279 B.R. 297 (June 12, 2002). Adv. No. 00-0203-M.

ISSUES: On Motion to Dismiss, whether 1) complaints failed to plead fraud with particularity (Rule 9(b)), 2) Amended Complaint failed to incorporate

claims from First Complaint, and 3) Amended Complaint was filed after the statute of limitations had expired.

RULING: The Court first held that the defendant's failure to assert a defense under Rule 9(b) with or before its answer operated as a waiver of such a defense. The Court further held that the Pretrial Order (already filed) superceded all of the previous pleadings and necessarily negated the Trustee's failure to incorporate the claims from the First Complaint. The Court finally concluded that the Amended Complaint was effectively filed within the statute of limitations. Because Rule 15(c), governing the relation back of amended complaints, contemplates the *conduct* of the parties, and because the allegations within the Amended Complaint were part of the same pattern of conduct (a series of transfers) asserted within the First Complaint, the Court held that the Amended Complaint related back to the original.

46. *Trisza Leann Ray, Plaintiff, v. The University of Tulsa, Works & Lentz, Inc., an Oklahoma professional corporation, and Works & Lentz of Tulsa, Inc., an Oklahoma professional corporation, Defendants (In re Ray),* 283 B.R. 70 (September 12, 2002). Adv. No. 00-0157-M.

ISSUE: Whether plaintiff was entitled to an award of fees and expenses incurred in prosecuting a motion to compel production of documents (including fees incurred in defending an appeal of the same) as well as a related motion to hold the defendant in contempt for failure to provide adequate discovery responses.

RULING: The Court granted the motion in part. The Court noted that two separate motions to compel had been filed and the first one denied in its entirety. Accordingly, the Court declined to award any fees or expenses for the first motion. The plaintiff also sought fees and expenses relating to two separate appeals of the order compelling discovery. The Court declined to award fees relating to said appeals, noting that there had been no finding that the appeals were frivolous and stating that an award would have the potential to chill attempts by litigants to pursue their rights of appeal. With respect to the balance of the fees and expenses sought, the Court reviewed the same on a detailed basis, and entered an order allowing $16,081.07 out of a total of approximately $40,000.00 sought.

47. *Bailey v. Bailey (In re Bailey)*, 285 B.R. 15 (November 8, 2002). Adv. No. 02-0030-M.

ISSUE: Whether an obligation to pay $90,000 to an ex-spouse under the terms of a divorce decree constituted alimony, maintenance or support under § 523(a)(5) of the Bankruptcy Code.

RULING: The Court held, based upon the facts of the case, that the $90,000 award was in the nature of a property settlement (the division of a jointly owned business venture) and was therefore dischargeable. The court noted that the debtor had treated a portion of his payments of the award as alimony for income tax purposes. The Court found that the tax treatment of an obligation was but one factor to be considered in determining whether that obligation constitutes "alimony, maintenance or support" and rejected the argument that such treatment mandated a finding that the obligation was alimony for bankruptcy purposes.

48. *In re Wallace*, 288 B.R. 139 (December 6, 2002). Case No. 02-00073-M.

ISSUE: Whether, as a result of filing pleadings containing baseless legal and factual allegations, filing restrictions should be imposed against a *pro se* debtor.

RULING: Yes. The court concluded that filing restrictions should be imposed where the pleadings were filed in a pattern of abusive behavior, where derogatory accusations were being made in the pleadings against the attorneys and judicial officer in the case, and where no evidence was presented to substantiate the accusations. The court determined that the nature of the restrictions must be decided on a case by case basis balancing the need of the *pro se* Debtor to have access to the court to address true and legitimate issues with the need to eliminate the waste of time and energy of all involved in responding to spurious allegations. In this case, the restrictions included requiring the debtor to state under penalty of perjury that the pleading was well founded in fact and law and not filed for an improper purpose. Debtor was also required to disclose whether he received any assistance in the preparation of pleadings and to affirm his intention to abide by the rules of the court.

49. *In re Sabre International, Inc.,* 289 B.R. 420 (February 18, 2003). Case No. 01-04481-M.

ISSUE: Whether an accounting firm, a member of which served as pre-petition receiver for the debtor and chief executive officer of the debtor post-

petition, was a "disinterested person" for purposes of § 101(14) of the Bankruptcy Code.

RULING: No. The Court found that the accounting firm was entitled to the ultimate receipt of all of the fees owed to the pre-petition receiver for performance of his services. As a result, the accounting firm held an economic interest adverse to the estate at the time the case was filed. (Note: The existence of this pre-petition obligation was not disclosed at the time the accounting firm sought to be appointed as accountant for the debtor-in-possession.) The Court also declined to award the receiver his pre-petition fees, noting the strong possibility of administrative insolvency of the case and its ultimate conversion to Chapter 7 (a fate predicted by counsel for the debtor).

50. *Woolman, et al. v. Wallace (In re Wallace)*, 289 B.R. 428 (February 19, 2003). Adv. No. 02-0222-M.

ISSUE: Whether Plaintiffs were entitled to a default judgment denying the discharge of the debtor.

RULING: Yes. The Court determined that the debtor/defendant, although having been properly served and having filed a motion to dismiss which had been overruled, failed to answer or otherwise further plead to the complaint. The Court also found, based upon the uncontested pleadings, admissions of the debtor and evidence offered by the Plaintiffs, that the debtor had made a false oath for purposes of § 727(a)(4) of the Bankruptcy Code. Having found grounds to deny debtor's discharge under § 727(a)(4), the Court did not reach any other issues of discharge or dischargeability.

51. *Commercial Fin. Servs., Inc. v. Temple (In re Commercial Fin. Servs., Inc.)*, 294 B.R. 164 (June 13, 2003). Adv. No. 02-0110-M.

ISSUE: Whether a tolling agreement between the parties allows a debtor to bring an action to set aside a fraudulent conveyance outside of the two year limitation period set forth in 11 U.S.C. § 546.

RULING: Yes. The Court held that 11 U.S.C. § 546 is a statute of limitations, not a statute of repose. Although the 10th Circuit has not directly ruled on this issue, the Court recognized that the 10th Circuit has found the two year period of § 546 to be subject to the doctrine of equitable tolling, a doctrine inconsistent with a determination of section 546 as a statute or repose. The Court also held that a contract may waive or extend the filing period of an adversary proceeding involving a fraudulent transfer beyond two years from the entry of relief under §546. The

Court thus denied the defendant's motion to dismiss or for summary judgment and allowed the adversary proceeding to continue.

52. *Malloy v. Zeeco (In re Applied Thermal Sys., Inc.)*, 294 B.R. 784 (June 30, 2003). Adv. No. 03-0044-M.

ISSUE: Whether a counterclaim brought by the estate against a creditor who has filed proof of claim constitutes a core proceeding under 28 U.S.C. § 157 and applicable case law; and whether the filing of a proof of claim waives a creditor's Seventh Amendment right to a jury trial.

RULING: Yes on both issues. The Court held that, under the plain language of 28 U.S.C. § 157(b)(2)(C) and the Supreme Court's holding in *Katchen v. Landy*, 382 U.C. 467 (1966), a compulsory counterclaim based on state law was a core proceeding over which the bankruptcy court had jurisdiction. The Court also ruled that filing a proof of claim waives a creditor's Seventh Amendment right to a jury trial on a state law counterclaim. The Court also determined that by filing a proof of claim against a bankruptcy estate, a creditor consents to the jurisdiction of the bankruptcy court. On that basis, the Court recommended that the motion of the creditor to withdraw the reference of this adversary proceeding and to return the case to the district court, be denied.

53. *Stillwater National Bank & Trust Co. v. Kirtley (In re Solomon)*, 300 B.R. 57 (January 9, 2003), *affirmed*, 299 B.R. 626 (BAP 10th Cir. 2003). Adv. No. 02-0057-M.

ISSUE: Whether an obligation under an individual guaranty of corporate debt was properly considered a valid liability for purposes of determining insolvency, and whether debtors received "reasonably equivalent value" from the lender when they granted mortgages on previously unencumbered property to secure pre-existing unsecured debt.

RULING: The Court found that the guaranteed obligations were to be included when making a determination of insolvency. When the Court included the corporate guarantees, it reached the conclusion that the debtors were insolvent at the time they granted the mortgages to the bank. The Court went on to find that the only effect of the mortgages was to convert the debt owed to the bank from an unsecured debt to a secured debt. In this case, no new money was provided to the debtors or their corporation. On this basis of these facts, the Court ruled that the debtors did not receive "reasonably equivalent value" in exchange for the mortgages. The Court ordered the mortgages avoided.

54. *H.L. Crane and Elaine Crane v. David Keith Morris (In re Morris)*, 302 B.R. 728 (December 17, 2003). Adv. No. 01-0368-M.

ISSUE: Whether the debtor should be denied his discharge under § 727(a)(3), (4) or (5).

RULING: No. Debtor was a building contractor with little business sophistication. He entered into a contract to construct a home for the plaintiffs. Litigation ensued, and the plaintiffs obtained a judgment against the debtor in state court for $170,000. Debtor then filed bankruptcy. The plaintiffs took issue with several items in debtor's schedules, including the valuation of certain assets. Plaintiffs also contended that the debtor's business records were not sufficient to allow the plaintiffs to glean an understanding of the debtor's business affairs and that the debtor had failed to explain a loss of his assets. After a thorough analysis of the facts presented, the Court rejected each of the plaintiffs' arguments.

55. *In re Beautyco, Inc.*, 307 B.R. 225 (March 30, 2004). Case No. 03-07621-M.

ISSUES: (1) Whether the filing of a motion to assume an unexpired lease within the 60 day time period contained in 11 U.S.C. § 365(d)(4) served to toll the deadline for the debtor to determine whether to assume or reject, or, to put it another way, whether the court is required to make its decision regarding whether to extend the time within the 60 day period; and (2) whether, on the facts of this case, cause existed to extend the time to allow for assumption or rejection of the lease.

RULING: (1) The filing of a motion to assume an unexpired lease within the 60 day period serves to toll the 60 day deadline. The Court followed the majority rule in this regard, finding that it would be inequitable to hold that the failure of a court to rule on a motion to assume within the 60 day period operated to deprive the debtor of substantive rights; and (2) the Court found cause to extend the deadline where the debtor was current on the lease obligations, the case was in its infancy, and the assets at issue were potential keys to the debtor's reorganization.

56. *In re Lewis*, 309 B.R. 597 (May 12, 2004). Case No. 04-10138-M.

ISSUES: The Chapter 13 Trustee filed a Motion For Review of Debtor's Transactions With Attorney, asking the Court to review the conduct of debtor's attorney in this and other cases. The facts before the Court revealed that said attorney had been engaged to represent the debtor in a Chapter 13 case, and the debtor's daughter and son-in-law in a Chapter 7 case. In the disclosures filed with the Court, said attorney

failed to disclose several significant items pertaining to his retention, including the fact that he had taken a post-dated check from the debtor in payment of filing fees and attorney's fees for the debtor's daughter and son-in-law, and later exchanged the post-dated for a cashier's check drawn from the debtor's post-petition income.

RULING: The Court ordered counsel for the debtor to disgorge all fees which he had received from the debtor pertaining to the Chapter 7 case of her daughter and son-in-law, denied all fees sought in the Chapter 13 case and also ordered counsel to make additional disclosures in all cases which the counsel had appeared as counsel for a debtor since January 1, 2003. The Court reserved the possibility of taking additional action upon review of said disclosures, and advised the attorney that if such disclosures were not timely made, an order to show cause why he should not be prohibited from further practice before this judge would be entered.

57. *Ronald J. Saffa, Individually and as Trustee v. Stephen P. Wallace (In re Wallace)*, 311 B.R. 601 (June 23, 2004). Adv. No. 04-1038-M.

ISSUE: Whether a party allegedly injured as the result of the defendant/debtor's failure to abide by orders of the bankruptcy court had standing to bring an action against the debtor/defendant sounding in criminal contempt.

RULING: No. The Court ruled that private individuals lack standing to bring an action in criminal contempt. Such actions must be brought by the United States Attorney or a disinterested private attorney appointed to serve as a special prosecutor in the case. The Court also ruled that bankruptcy courts lack jurisdiction over criminal contempt proceedings which seek to incarcerate the defendant for the purposes of punishment, and that, in the event such proceedings are brought before the proper court, the defendant is entitled to a jury trial.

58. *Steven W. Soulè, Trustee, v. Eric Alliot, Jr., et al. (In re Tiger Petroleum Co.)*, 319 B.R. 225 (December 30, 2004). Adv. No. 01-0137-M.

ISSUES: 1. Whether partial summary judgment was the proper procedural vehicle for determining a portion of the plaintiff's case, where relief sought would not result in a dispositive judgment on any of the plaintiff's claims.

2. Whether, as a matter of law, court could conclude that investors in a fraudulent scheme were entitled to assert that they had entered into the subject transactions in good faith and

for value, and thus defeat plaintiff's fraudulent transfer claims.

3. Whether, in calculating the amount of value which debtor provided to investors in fraudulent scheme, plaintiff/trustee was entitled to include alleged tax benefits received by defendants as a result of their investments.

RULINGS: 1. No. The Court determined that partial summary judgment was procedurally proper only if the granting of the relief sought would result in a dispositive judgment on one or more of the plaintiff's claims.

2. No. The Court concluded that material questions of fact regarding the conduct of the defendants remained unresolved, and denied the defendants' request for summary judgment.

3. No. The Court determined that any tax benefits which the defendants may have received as a result of their investment did not constitute value for purposes of a fraudulent transfer analysis. The Court noted that the tax benefits were speculative, that any tax benefits came from the government, not from the alleged tortfeasor, and that the tax benefits were subject to review by the taxing authorities given that the legitimacy of the underlying transactions had been called into doubt. The Court also noted the absence of any authority which had embraced the position advanced by the plaintiff.

59. *In re Farmers Cooperative Association*, 323 B.R. 494 (Bankr. D. Kan. April 19, 2005). Case No. 00-22385-11-TLM.

ISSUES: 1) Whether a creditor had a claim for attorney fees and costs under § 506 following a partial settlement with the debtor where the creditor and debtor had settled all differences in relation to the debt owed prior to the filing of the bankruptcy case.
2) Whether a postpetition claim for attorney fees and costs should be given administrative claim status under § 503(b)(1)(A) of the Bankruptcy code, which provides an administrative priority for “the actual, necessary costs and expenses of preserving the estate.”

RULING: 1) The Court found that since the prepetition claim was satisfied in full, the claim the creditor made was a postpetition claim and the holder of that postpetition claim was not a “creditor” for purposes of § 506 of the Bankruptcy Code. Therefore, the Court declared that the claim to receive postpetition attorney fees failed the four prong test set forth by

the Kansas bankruptcy courts. The Motion to Permit Filing, Allowance, and Payment of Claim for Post-Confirmation Attorney's Fees was denied in the Bankruptcy Court and all issues relating to the award of attorney's fees were to be resolved by the District Court.
2) The Court adopted the two-prong test established by the United States Court of Appeals for the Tenth Circuit to entitle a creditor's postpetition claim administrative priority. First, the expense must be a postpetition transaction. Second, the expense must have not only been necessary to preserve the estate, but it must have benefitted the estate. The Court states that the issue is predicated upon whether the estate received a benefit, as opposed to whether the creditor might experience a loss. The Court concluded that since there was nothing in the record which established that the FCA benefitted from the fees incurred by CoBank, the detriment suffered by CoBank was not enough to entitle the claim administrative priority.

60. *In re Lowrance*, 324 B.R. 358 (Bankr. N.D. Okla. Feb. 28, 2005). Adv. No. 03-0225-M.

ISSUE: Whether tax obligations in excess of five million dollars owed by debtor to the United States of America, acting through the Internal Revenue Service, are dischargeable under § 523(a)(1)(C).

RULING: In order for a creditor to exempt a tax duty under § 523(a)(1)(C), the creditor must show that the debtor willfully evaded or defeated the tax. The Court cited *Dalton v. I.R.S. (In re Dalton)*, 77 F.3d 1297, 1301 (10th Cir. 1996) and held that a debtor's actions are willful under § 523(a)(1)(C) if they are done "voluntarily, consciously or knowingly, and intentionally." Since the debtor filed a tax return showing liability and made no effort to voluntarily pay this debt while proceeding to conceal monies from the IRS, the Court concluded that the debtor willfully evaded or defeated the tax. All obligations of the debtor to the IRS, including all interest, charges, and penalties appurtenant thereto, were not discharged.

61. *In re ELRS Loss Mitigation, LLC,* 325 B.R. 604 (Bankr. N.D. Okla. June 6, 2005). Case No. 05-11191-M.

ISSUE: 1) Whether the creditors who filed an involuntary bankruptcy petition were eligible to do so under § 303(b) of the Bankruptcy Code.

2) Whether the alleged debtor was generally not paying its debts as they fell due under § 303(h)(1).

RULING: 1) Under § 303(b), a petitioning creditor does not have standing when its debt is subject to a "bona fide" dispute. The Court applied the standard propounded by *Bartmann v. Maverick Tube Corp.,* 853 F.2d 1540 (10th Cir. 1988) as to what constitutes a bona fide dispute. After applying this standard to each of the six petitioning creditors, the Court found that only 3 of the creditors had standing. Since the aggregated amount of the claims of those 3 creditors exceeded the statutory requirement of $12,300, the Court found a sufficient number of creditors with claims in the necessary amount to establish jurisdiction over the case.

2) The Court applied two tests to the facts at bar to determine whether the alleged debtor was paying its debts as they came due. The first test was a mathematical test described in *In re Better Care, Ltd.,* 97 B.R. 405 (Bankr. N.D. Ill. 1989). After applying this two-step inquiry and determining that the number and amount of unpaid debts did not exceed the number and amount of paid debts, the Court concluded that the alleged debtor had generally been paying its debts as they fell due. The second test was a totality of the circumstances test set forth by the United States Court of Appeals for the Tenth Circuit in *Bartmann,* 853 F.2d at 1546. In applying this test, the Court considered two significant circumstances. First, it considered the factors established by the mathematical test set out above. It then considered the fact that the creditor filed the bankruptcy petition in order to resolve a two-party dispute between the creditor and the debtor. The Court determined once again that the debtor was paying its debts as they fell due and dismissed the case. The Court noted that even if the petitioning creditors had carried their burden of showing that the alleged involuntary debtor was "generally not paying" its debts, the Court would have dismissed the case under the abstention provision of the Bankruptcy Code since it found that there was no efficiency of administration to be served by a Chapter 7 bankruptcy case. The debtor was awarded attorney's fees and costs incurred in connection with its defense of the involuntary petition.

62. *In re Universal Factoring Co., Inc.*, 329 B.R. 62 (Bankr. N.D. Okla. August 22, 2005). Case No. 98-03383-M.

ISSUE: Whether counsel, who had acted as counsel for the debtor and as special counsel for the bankruptcy trustee, was entitled to an award of fees and expenses for services related to an attempt to reorganize a debtor which had no legitimate business operations, either prior to or during the pendency of the bankruptcy case.

RULING: No. The Court found that counsel knew or should have known that

the business of the debtor was nothing more than a "Ponzi" scheme, and that there was no real possibility of reorganization. The Court found that the services of counsel in preparing and filing various plans of reorganization were of no benefit to the bankruptcy estate. Finally, the Court noted that, after counsel was appointed as special counsel to the trustee and affirmatively represented to the Court that they would from that point on be working solely for the trustee, said counsel continued to perform services at the direction of the debtor, contrary to the understanding of the Court and the desires of the trustee. Under these circumstances, the Court allowed no fees.

63. *Malloy v. The Cornerstone Bank (In re Snell)*, 329 B.R. 753 (Bankr. N.D. Okla. Sept. 2, 2005). Adv. No. 04-01212-M.

ISSUE: Whether a lien on a certificate of title issued by the Cherokee Nation was validly perfected under Oklahoma law and thus not subject to avoidance by a trustee in bankruptcy.

RULING: Yes. The Court found that the Cherokee Nation had enacted specific laws outlining the necessary steps for perfection of a lien upon a vehicle when the certificate of title for the vehicle had been issued by the Cherokee Nation, and that Oklahoma law recognized the validity of such liens. The Court rejected the argument that the Oklahoma statutes recognizing the validity of the laws of the Cherokee Nation regarding lien perfection were unconstitutional.

64. *In re West*, 338 B.R. 906 (Bankr. N.D. Okla. March 6, 2006). Case No. 02-00223-M.

ISSUE: The Court considered whether sanctions of counsel were appropriate where said counsel acted as a "ghost-writer" for pleadings filed in the name of his clients, and then made affirmative misrepresentations in an attempt to conceal his behavior from the Court. Counsel's conduct appeared to be related to his unwillingness to file documents in electronic format as required by the General Orders and Administrative Procedures of the Court.

RULING: The Court found that counsel acted with a deliberate intent to deceive and/or mislead the Court, and imposed monetary sanctions in the amount of $1,000.00. In addition, the matter was referred to the Disciplinary Committee for the United States District Court for the Northern District of Oklahoma for further action.

65. *Custom Heating & Air, Inc. v. Andress (In re Andress)*, 345 B.R. 358 (Bankr. N.D. Okla. June 28, 2006). Adv. No. 05-01088-M.

ISSUE: Whether a state court judgment entered as a result of an alleged breach of a covenant not to compete is non-dischargeable under § 523(a)(6), which precludes the discharge of indebtedness incurred as a result of "willful and malicious injury." The state court judgment at issue, in the amount of $185,000, plus attorneys' fees, was entered as a result of counsel's failure to appear at a pre-trial conference, and not after a trial on the merits of the plaintiff's claim.

RULING: The court determined that the creditor was entitled to a non-dischargeable claim against the debtor in the total sum of $5,000. In making this ruling, the court determined that:

(1) it was not precluded from making an independent determination of the dischargeability of the debt under the *Rooker-Feldman* doctrine, notwithstanding the finding in the state court judgment that the debtor had acted "willfully and maliciously";

(2) the state court judgment was not binding on the bankruptcy court under the doctrines of *res judicata* or collateral estoppel;

(3) on the evidence presented to the bankruptcy court, the creditor established that the debtor breached his contractual covenant not to compete in violation of § 523(a)(6); and

(4) based upon the evidence presented at trial, the damages suffered by the creditor as a result of the breach of the covenant not to compete were in the total amount of $5,000, which was the value placed upon the covenant not to compete by the parties at the time they entered into the covenant.

The court also declined to award either party its fees or costs.

66. *In re Stillwell*, 348 B.R. 578 (Bankr. N.D. Okla. Aug. 22, 2006), Case No. 06-10641-M.

ISSUE: Whether to approve a reaffirmation agreement upon a motor vehicle which the debtor admittedly could not afford, even though the debtor desired to reaffirm the debt and counsel for the debtor represented to the court that the agreement did not impose an undue hardship upon the debtor.

RULING: The Court refused to approve the agreement, noting that:

(1) the debtor's expenses exceeded her income by over $385.00 per month, and the debtor had $185 per month available to

make a payment of $570.81 under the agreement;

(2) under § 524(m)(1) of the Bankruptcy Code, there was a presumption that the agreement would impose an undue hardship upon the debtor and her dependents;

(3) debtor's testimony that she would obtain a real estate license and her husband would work more overtime in order to make the payments were far too speculative to support a finding that the debtor had the present ability to make the payments;

(4) approval of a reaffirmation agreement which the debtor cannot perform is not the proper role of the bankruptcy court.

67. *In re Brown*, 354 B.R. 535 (Bankr. N.D. Okla. 2006), Case No. 06-10734-M.

ISSUE: Whether an attorney who is not a disinterested party under § 327(a) of the United States Bankruptcy Code may "ghostwrite" pleadings for a debtor who then submits those pleadings to the court on a *pro se* basis.

RULING No. The attorney was publicly admonished for his conduct. In addition, the Court required the attorney to submit additional information regarding the amount and nature of attorney's fees incurred in the case for the purpose of allowing for review of those fees by the Court.

68. *Bailey v. Turner (In re Turner)*, 358 B.R. 422 (Bankr. N.D. Okla. 2006), Adv. Proc, No. 06-01089-M.

ISSUE: Whether, for purposes of non-dischargeability under § 523(a)(2)(B), a creditor could as a matter of law be found to have reasonably relied upon a financial statement which showed a guarantor's 100% interest in a corporation to have a value of $3.4 million when the creditor also had in his possession the financial statements of the corporation which showed the corporation to have a *negative* equity of $3.4 million.

RULING: No. The Court found that reliance upon the financial statement of the guarantor when the creditor had knowledge or reason to know that the value of the corporation contained in that financial statement was inaccurate was unreasonable as a matter of law. The Court granted summary judgment for the debtor and dismissed the dischargeability complaint with prejudice.

69. *In re Quick*, 360 B.R. 722, 2007 WL 269808 (Bankr. N.D. Okla.), Case No. 06-10729-M; Case No. 06-11031.

ISSUE: Whether, as a result of the revisions to 11 U.S.C. § 1325 which are often referred to as the "hanging paragraph," a debtor may surrender a motor vehicle to a creditor holding a purchase money security interest in the vehicle incurred within the 910-day period preceding the date of the filing of the petition in full satisfaction of the creditor's claim, effectively precluding the filing of an unsecured deficiency claim after the liquidation of the vehicle.

RULING: The Court ruled that the "hanging paragraph" prevents bifurcation of an allowed secured claim into secured and unsecured components. As a result, upon surrender of a vehicle pursuant to 11 U.S.C. 1325(a)(5)(C), a 910-creditor's claim is satisfied in full and no deficiency claim may be filed.

70. *In re Forest Hill Funeral Home & Memorial Park*, ___ B.R. ___, 2007 WL 900280, (Bankr. E.D. Okla. March 26, 2007); Case No. 07-80056.

ISSUE: Whether a bankruptcy case involving allegations of misappropriation of funds relating to funeral homes and cemeteries in Tennessee and Arkansas should remain in bankruptcy court, or dismissed due to the lack of good faith of the debtor in filing the case. As an alternative, the Court was asked to consider abstaining from hearing the case or transferring the case to the United States Bankruptcy Court for the Western District of Tennessee.

RULING: On the basis of detailed findings of fact, the Court determined that the case was not filed in good faith. Moreover, the Court found that the interests of all parties would be best served by dismissal of the case, which would allow the matter to be resolved in litigation currently pending in the state courts of Tennessee. The Court declined to transfer venue of the case to the Tennessee bankruptcy court.